SUBJECT INDEX.

PAGE

Petition for writ of certiorari

Summary statement of the matter involved 1

Reasons relied on for the allowance of the writ 2

Prayer for writ 3

Brief in support of petition for writ of certiorari

I. The opinions of the courts below 4

II. Jurisdiction 4

III. Statement of the case 5

IV. Specification of errors 5

V. Argument 5

Summary of argument 5

Point A—Decision below recaptures surrendered matter 5

Point B—Decision below so enlarges claim 1 as to invalidate it 8

Point C—Decision below misstates prior art patents 9

Point D—Functional removability of key is element of claim 9

Point E—Circuit Court of Appeals affirms District Court's misuse of doctrine of equivalents 12

Point F—Claim does not read "squarely" on accused device and even if it did, infringement not thereby conclusively shown 12

Conclusion 13

TABLE OF CASES.

PAGE

Exhibit Supply Co. vs. Ace Patents Corp., 315 U. S. 126 8

Hazeltine Corporation vs. Emerson Television-Radio, Inc., C. C. A. 2nd, 129 F. 2nd 580, 582 13

Ruth vs. Climax Molybdenum Co., 93 F. 2nd 699, 703 13

Schriber-Schroth Co. vs. Cleveland Trust Co., 311 U. S. 211 ..... 4, 8, 12

United Carbon Co. vs. Binney & Smith Co., 63 S. Ct. 165; 87 L. Ed. 158 5

Westinghouse vs. Boyden Power Brake Co., 170 U. S. 537 13

TABLE OF STATUTES AND RULES.

Judicial Code §240 as amdd. 4

Rules of this Court—Rule 38, 5(c) 5

Supreme Court of the United States

OCTOBER TERM 1942.

NO.

BAND-IT COMPANY, a corporation, and DENTAL SPECIALTY COMPANY, a corporation,
PETITIONERS,

v.

MICHAEL J. McANENY, JR.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of Band-It Company, a corporation, and Dental Specialty Company, a corporation, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Michael J. McAneny, Jr. sued petitioners charging infringement of both claims, Nos. 1 and 2, of Campbell patent No. 2208114, issued July 16, 1940, for a tool for applying hose clamps (Ex. 1, R. 198-203).

The United States District Court for the District of Colorado found and held (R. 17, 19-20) both claims infringed by petitioners' hose clamp applying tool (Physical exhibits "Band-It Device" and "Band-It Tool Ex. 6" and illustrated in "Band-It Circular Ex. D," R. 313), entered Findings of Fact and Conclusions of Law accordingly (R. 20-21) and decreed injunction and accounting (R. 22-23).

On appeal the United States Circuit Court of Appeals, Tenth Circuit, modified the decree, holding no infringement of claim 2 but otherwise affirming the decree of the District Court (Opinion R. 317-323, 131 F. 2nd 766, judgment R. 323).

Petitioners seek review and reversal by this Honorable Court of that part of the judgment and opinion of the Circuit Court of Appeals holding claim 1 infringed.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided a federal question (to-wit, a question of patent law) in a way which conflicts with the applicable decisions of this Honorable Court, in that

1. By its construction of claim 1 of the Campbell patent No. 2208114 it has revived and restored to the patent the subject matter of claims which the patentee, during the course of the prosecution of his case in the patent office, cancelled, surrendered and abandoned.

2. By its construction of said claim it has so changed and enlarged the scope thereof as to render the claim invalid in view of any one of at least three prior art patents of record.

3. (Specifically—in elaboration of paragraphs 1 and 2) By holding that "In prior devices the strip had to be cut" to certain lengths before application of the tool to the strip and that the "primary improvement" in the patented device was the structure making possible the sidewise insertion of the band or strip in the cutting element, the Circuit Court of Appeals revived and restored to the patent the substance of cancelled, surrendered and abandoned claims and so broadened said claim as to invalidate it in view of the prior art patents of record.

4. In holding that, because the word "key" was not expressly modified in said claim by the word "removable," functional removability of the key is not an element of the claim, the Circuit Court of Appeals failed to limit the

claim to a key functionally removable, contrary to the applicable decisions of this Honorable Court.

5. In affirming the District Court's decree of infringement of said claim the Circuit Court of Appeals affirmed the District Court's holding that petitioners' band gripping structure, having no functionally removable key, is the mechanical equivalent of the band gripping structure defined in said claim and thereby decided a patent law question contrary to the applicable decisions of the Honorable Court.

6. In holding that said claim reads "squarely" on the accused device, the Circuit Court of Appeals was in error but, even did the claim so read, the holding that such reading is conclusive of the question of infringement is in conflict with the applicable decisions of this Honorable Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2494, Band-It Company, a corporation; and Dental Specialty Company, a corporation, Appellants, vs. Michael J. McAneny, Jr., Appellee, and that the said judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

BAND-IT COMPANY AND
DENTAL SPECIALTY COMPANY,

By CARLE WHITEHEAD AND
ALBERT L. VOGL,
Counsel for Petitioners.

WILBUR M. ALTER,
ERNEST B. UPTON,
Of Counsel.